SUPREME COURT OF THE UNITED STATES.

No. 226.

JAMES G. BARROWS, PLAINTIFF IN ERROR,

vs.

GRANVILLE L. KINDRED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ILLINOIS.

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1 Pleas in the circuit court of the United States of America for the southern district of Illinois, held in the city of Springfield, in said district, before the Hon. David Davis, presiding, one of the justices of the Supreme Court of the United States of America, and the Hon. Samuel H. Treat, associate district judge of said district, on the eighteenth day of June, at the June term of said court, in the year of our Lord one thousand eight hundred and sixty-three, and of our independence the eighty-seventh year.

P. P. ENOS, *Clk.*

JAMES G. BARROWS
v.
GRANVILLE L. KINDRED. } Ejectment.

SOUTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered, that heretofore, to wit, on the fourth day of June, at the June term of the circuit court of the United States for the southern district of Illinois, in the year of our Lord one thousand eight hundred and
2 sixty-one, came the said plaintiff by his said attorneys and filed in open court his declaration in ejectment, together with a notice to said defendant and an affidavit of a due service of a true copy thereof upon said defendant, and also, at the same time, filed his bond for costs in said entitled cause, which said bond for costs, declaration, notice, and affidavit are in the words and figures following, to wit:

United States circuit court, June term, A. D. 1861.

JAMES G. BARROWS
v.
GRANVILLE L. KINDRED. } In ejectment.

UNITED STATES OF AMERICA,
Southern district of Illinois, ss:

I enter myself security for costs in this cause and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court, and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, I hereby agree and stipulate that execution may issue against my property for any costs taxed against the plaintiff.

Dated this 20th day of May, A. D. 1861.

B. W. BARROWS.

3 United States circuit court, June term, A. D. 1861.

UNITED STATES OF AMERICA,
Southern district of Illinois:

Granville L. Kindred, who is a citizen of the State of Illinois, was summoned to answer unto James G. Barrows, who is a citizen of the State of New Jersey, of a plea of trespass and ejectment, for that, whereas, heretofore, to wit, on the first day of May, in the year of our Lord one thousand eight hundred and sixty-one, at and within the the county of Brown and southern district and State of Illinois, the said plaintiff was possessed as of his own demesne in fee simple of a certain tract of land situate at and within the said county, district, and State, and known as the southeast quarter of section two in township one south, of range four west of the fourth principal meridian, which land exceeds in value five hundred dollars, and the said

plaintiff being then and there so possessed of said premises the said defendant there afterwards, to wit, on the day and year aforesaid entered into the said described premises, and from the time last aforesaid unlawfully withheld and does now unlawfully withhold from the said plaintiff the possession of the said premises, to the damage of the said plaintiff the sum of one hundred dollars, and therefore he brings suit, &c.

GRIMSHAW & WILLIAMS,
Attorneys for Plaintiff.

4 To Mr. Granville L. Kindred:

You are hereby notified that the declaration with a copy of which you are now herewith served, and to which this notice is subjoined, will be filed in the circuit court of the United States for the southern district of Illinois, on the first day of the June term thereof, A. D. 1861, and that upon filing the same a rule will be entered requiring you to appear and plead to the said declaration within twenty days after the entry of said rule, and that if you neglect so to appear and plead a judgment by default will be entered against you and the plaintiff will recover possession of the premises specified in said declaration.

Dated this 20th day of May, A. D. 1861.

GRIMSHAW & WILLIAMS,
Attorneys for Plaintiff.

United States circuit court, southern district of Illinois, June term, A. D. 1861.

JAMES G. BARROWS
v.
GRANVILLE L. KINDRED. } In ejectment.

UNITED STATES OF AMERICA,
State of Illinois, Brown County, ss:

5 B. W. Barrows, being duly sworn, deposes and says that he did on the twenty-first day of May, A. D. 1861, serve Granville L. Kindred, the defendant in this suit, with a true copy of the declaration hereunto annexed, and also a true copy of the notice in writing to the said declaration subjoined, and likewise hereunto annexed, by leaving the same with him, said Kindred, on said day. And further this deponent saith not.

B. W. BARROWS.

Subscribed and sworn to before me, by said B. W. Barrows, this 21st day of May, A. D. 1861, at my office, in Mount Sterling, Brown County, Illinois, in said southern district.

Witness my hand and the seal of the circuit court of Brown County, Illinois, hereto affixed.

A. A. GLENN,
Clerk Circuit Court, Brown Co., Ill's.

Endorsed: Bond for costs, declaration, notice, and affidavit. Filed this 4th day of June, A. D. 1861.

P. P. ENOS, *Clerk.*

And afterwards, to wit, on the fourteenth day of June, in the year last aforesaid, came the said defendant, by his said attorney, and filed in the office of the clerk of said court his plea to the declaration of the said plain-
6 tiff, which said plea is in the words and figures following, to wit:

June term of U. S. circuit court for southern district of Illinois.

GRANVILLE L. KINDRED
ads.
JAMES G. BARROWS.

And the said Kindred, by O. H. Browning, his att'y, comes and defends the force and injury when, &c., and says that he is not guilty of the said supposed trespasses and ejectment above laid to his charge, or of any part thereof in manner and form as the said plaintiff hath above thereof complained against him, and of this he, the said Kindred, puts himself on the country.

O. H. BROWNING, *pro Def't.*

Pl'ff the like.

GRIMSHAW & WILLIAMS, *P. Q.*

Endorsed: Filed June 14th, 1861.

P. P. ENOS, *Clerk.*

And afterwards, to wit, on the eighteenth day of June, in the year
7 of our Lord one thousand eight hundred and sixty-three, the following proceedings were had in said court, in said entitled cause, and entered of record, to wit:

JAMES G. BARROWS
v.
GRANVILLE L. KINDRED. } Ejectment.

Now comes the plaintiff by Messrs. Grimshaw & Williams, his attorneys, and now comes also the defendant by O. H. Browning, esq., his attorney, and issue being joined, thereupon come a jury of good and lawful men, to wit: Henry Fawcett, William Billington, Jacob J. Brown, William S. Moore, C. P. Ford, Horace Hickox, Hugh Andrews, James Gourley, William Post, Robert A. Goudy, B. W. Henry, and Ford Lewis, who were duly elected, tried, and sworn well and truly to try said issue, and after hearing the evidence and arguments of counsel, and receiving instructions from the court, the jury returned into court the following verdict, to wit: "We, the jury, find the defendant not guilty of unlawfully withholding from the plaintiff the possession of the real estate and premises described in the plaintiff's declaration."

It is thereupon considered and adjudged by the court that the defendant be discharged from this suit, and go hence without day, and that he have and recover of the plaintiff his costs by him about his defence in
8 this behalf expended, amounting to the sum of thirty-four dollars and fifteen cents, and that he have execution therefor.

And afterwards, on the same day and year last aforesaid, the following further proceedings were had in said court in said entitled cause, and entered of record, to wit:

JAMES G. BARROWS
v.
GRANVILLE L. KINDRED. } Ejectment.

On motion of the plaintiff, by his attorneys, leave is granted him by the court to settle his bill of exceptions at the next term.

And afterwards, to wit, on the eighteenth day of June, in the year last aforesaid, came the said plaintiff by his said attorneys and filed his bill of exceptions, which said bill is in the words and figures following, to wit:

9 Circuit court of the United States in and for the southern district of Illinois, of the June term, A. D. 1863.

JAMES G. BARROWS
v.
GRANVILLE L. KINDRED. } Ejectment.

Be it remembered, that on the trial of this cause before the said court and a jury empannelled herein, at this the June term, A. D. 1863, of said court, the plaintiff, to maintain the issue on his part, offered and read in evidence, first, a patent in due form from the United States to Eleazer Whitney, dated the eleventh day of September, A. D. 1818, and for the lands in controversy. Second, a deed in due form from said Eleazer Whitney to Robert C. Vose, for said land, and dated the tenth day of April, A. D. 1819, in words and figures following:

This indenture, made seventh day of April, in the year of our Lord one thousand eight hundred and nineteen, between Eleazer Whitney, at present of Dearborne, in the county of Kennebec, and commonwealth of Massachusetts, of the first part, and Robert C. Vose, of Augusta, in the county and commonwealth aforesaid, esquire, of the second part. Whereas the United States of America have granted to the said party of the first part certain letters patent, in the words and figures following, to wit:

James Monroe, President of the United States of America, to all to whom these presents shall come greeting: Know ye that in pursuance of the acts of Congress appropriating and granting land to the late army of the
10 United States, passed on and since the sixth day of May, 1812, Eleazer Whitney having deposited in the General Land Office a warrant in his favor, numbered 18501, there is granted unto the said Eleazer Whitney, late a private in Hoyt's company, of the ninth regiment of infantry, a certain tract of land containing one hundred and sixty acres, being the southeast quarter of section two, of township one south, in range four west, in the tract appropriated (by the acts aforesaid) for military bounties, in the Territory of Illinois, to have and to hold the said quarter section of land, with the appurtenances thereof, unto the said Eleazer Whitney, and to his heirs and assigns forever.

In testimony whereof, I have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed. Given under my hand, at the city of Washington, this eleventh day of September, in the year of our Lord one thousand eight hundred and eighteen, and of the independence of the United States of America the forty-third.

JAMES MONROE.

By the President:
JOSIAH MEIGS, *Commissioner of the General Land Office.*

Now this indenture witnesseth, that the said party of the first part, for and in consideration of the sum of sixty dollars of lawful money of the United States of America, to him in hand paid at or before the ensealing
11 and delivery of these presents by the said party of the second part, the receipt whereof is hereby acknowledged, and the said party of second part, his heirs, executors, and administrators, forever released and discharged from the same, by these presents, have granted, bargained, sold, and removed, released, conveyed. and confirmed, and by these presents do grant, bargain, sell, alien, remise, release, convey, and confirm, unto the said party of the second part, and to his heirs and assigns forever, all the said tract of land granted in and by the said patent to the said party of the first part, situate and containing the number of acres as in the said patent is described, together with all and singular the tenements, the hereditaments,

and appurtenances whatsoever unto the said tract of land and premises in anywise appertaining or belonging, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in, or to the same, and every part and parcel thereof, with the appurtenances. To have and to hold the above granted, bargained, and described premises, with the appurtenances, unto the said party of the second part, heirs and assigns, to his and their own proper use and behoof forever. And the said party of the first part, for himself, his heirs, executors, and administrators, doth covenant, grant, promise, and agree to and with the said party of the second part, his heirs and assigns, that he, the said party of the first
12 part, at the time of the sealing and delivering of these presents, is lawfully seized in his own right of a good, absolute, and indefeasible estate of inheritance in fee simple of, in, and to all and singular the above granted, bargained, and described premises, with the appurtenances, and hath good right, full power, and lawful authority to grant, bargain, sell, and convey the same in manner and form aforesaid, and that the said party of the second part, his heirs and assigns, shall and may at all times hereafter peaceably and quietly have, hold, use, occupy, possess, and enjoy the above granted premises, and every part thereof, with the appurtenances, without any let, suit, trouble, molestation, eviction, or disturbance of the said party of the first part, his heirs or assigns, or of any other person or persons lawfully claiming or to claim the same, and that the same now are free, clear, discharged, and unincumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments, dower, right of dower, and incumbrances of what nature or kind soever. And also that the said party of the first part and his heirs, and all and every other person or persons whomsoever lawfully or equitably deriving any estate, right, title, or interest of, in, or to the hereinbefore granted premises, by, from, under, or in trust for them or either of them, shall and will at any time or times hereafter, upon the reasonable request and at the proper costs and charges in the law of the said party of the second part, his heirs and assigns, make, do, and execute, or cause or procure to be made, done, and executed, all and every such further and other lawful and reasonable
13 acts, consequences, and assurances in the law for the better and more effectually vesting and confirming the premises hereby intended to be granted in and to the said party of the second part, his heirs and assigns forever, as by the said party of the second part, his heirs or assigns or his other counsel learned in the law, shall be reasonably devised, advised, or required. And the said party of the first part, and his heirs, the above described and hereby granted and released premises and every part thereof, with the appurtenances, unto the said party of the second part, his heirs and assigns, against the said party of the first part, and his heirs, and against all persons whomsoever lawfully claiming or to claim the same, shall and will warrant and by these presents forever defend.

In witness whereof, the party of the first part to these presents has hereunto set his hand and seal the day and year first above written.

ELEAZER WHITNEY.

Sealed and delivered in the presence of—
JOHN DAVIS.
JOEL A. ELLIS.

UNITED STATES OF AMERICA, *State of Massachusetts, ss:*

On this tenth day of April, in the year of our Lord one thousand eight hundred and nineteen, before me came the above-named Eleazer Whitney,

being duly sworn, did depose and say that he is the same person
14 described as the above patentee in the patent above recited, and who executed the above deed. And that he hath not sold or in manner heretofore granted or conveyed the lot of land above described to any person or persons whatsoever. And the said Eleazer Whitney being proved to me, by the oath of Joel A. Ellis, to be the identical person named and described in and who executed the above deed; and the said Eleazer Whitney, after having the contents thereof properly and satisfactorily explained to him, acknowledged that he executed the same for the purposes therein mentioned, there being therein no material erasures or interlineations. I allow the same to be recorded.

In testimony whereof, I, the subscriber, a justice of the peace and quannar, and also clerk of all the judicial courts held within and for the county of Kennebec, have hereunto subscribed my name and affixed my official seal, this tenth day of April, A. D. 1819.

[L. S.] JOHN DAVIS.

STATE OF ILLINOIS, *Brown County:*

RECORDER'S OFFICE,
Mount Sterling, June 5th, 1840.

I, Albert G. Alexander, recorder in and for said county do certify that the within deed and certificate are this day duly recorded in Book A, at page 244, 5, and C, at my office.

ALBERT G. ALEXANDER, *Recorder.*

15 Received on the day of the date of the above indenture the consideration money therein mentioned in full.

ELEAZER WHITNEY.

Witness present—
JOHN DAVIS.
JOEL R. ELLIS.

Third. A will of Robert C. Vose, with the accompanying certificates, in words and figures following, to wit:

STATE OF ILLINOIS, *Brown County, ss:*

Be it remembered, that at a term of the county court in and for the county of Brown, and State of Illinois, held at the court-house, in Mount Sterling, in said county, in this fifth day of January, A. D. 1859, James G. Barrows, by his attorneys, Williams, Grimshaw & Williams, presented to said court a duly certified copy of the last will and testament of Robert C. Vose, deceased, together with the accompanying certificates, which said will and certificates being then and there inspected by the court, it is ordered by the court that said will and certificates be recorded and be deemed and taken to be duly probated in this court, said will and certificates being in words and figures following, to wit:

I, Robert C. Vose, being satisfied that the laws of inheritance and distribution of estates will operate as equally and justly in regard to my estate as any provision I could make, yet being desirous of making some
16 provision for my aged mother and for my sister, who otherwise could not derive any benefit from my estate, and also to provide for the convenient conveyance of such real estate as I may die seized of, excepting my mansion house and the lot on which it stands, do make and publish this my last will and testament.

First. I give and bequeath to my mother, Meriam Vose, if she should survive me, one hundred and fifty dollars yearly, to commence at my decease and to be paid to her by my executors in half yearly payments during her natural life.

Secondly. If my sister, Lydia B. Koogland, should survive me and our mother, I give and bequeath to her one hundred dollars annually, to commence upon the decease of our said mother if she should survive me, if not, upon my decease and to be paid in half yearly payments during her natural life by my executors.

Thirdly. I authorize and empower my said executors and the survivors of them from time to time, as they or the survivors of them may think expedient, to sell and convey in fee, by proper deeds, any and all of the real estate of which I may die seized or entitled to, excepting my mansion house and the grounds on and around which it stands, on the east side of Court street and south of the gully and run of water, and upon such credit and security as they or the survivor may think proper, the proceeds of which are to
17 be added and distributed as personal estate.

Fourthly. In addition to her dower in my real and distributive share of my personal estate, I hereby give and devise to my wife, Caroline G. Vose, the use of my mansion house and household furniture so long as she shall remain my widow.

Fifthly. I appoint Renel Williams and George W. Morton and the survivor of them to be executors of this my last will.

In testimony whereof, I hereunto subscribe my name this second day of December, anno Domini one thousand eight hundred and thirty-four.

ROBERT C. VOSE.

Signed by the testator and published by him as his last will in presence of us, who by his request and in his presence, and in the presence of each other subscribed our names as witnesses.

WM. M. STRATTON.
JOHN H. RICE.
WM. WOART, Jr.

Copy. Attest: GEO. ROBINSON, *Register.* [L. S.]

STATE OF MAINE, *County of Kennebec, ss:*

I, George Robinson, register of the court of probate in and for the county of Kennebec and State aforesaid, hereby certify that the foregoing in-
18 strument attested by me as register is a true copy of the last will and testament of Robert C. Vose, late of Augusta, in said county, deceased testate, as of record appears. I also certify that it appears of record that said will was duly proved, approved, and allowed as the last will and testament of said deceased, at a court of probate held in Augusta, within and for said county, on the last Monday of July, anno Domini, eighteen hundred and thirty-six.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court of probate this first day of June, in the year of our Lord one thousand eight hundred and thirty-nine.

GEO. ROBINSON, *Register.*

STATE OF MAINE, *County of Kennebec, ss:*

I, Henry W. Fuller, judge of the court of probate in and for the county of Kennebec, and State aforesaid, hereby certify that George Robinson, whose signature is attached to the above certificate, is register of probate for said county of Kennebec, and that full faith and credit are to be given to his attestations and official acts as such.

[L.S.] Given under my hand and seal of office this first day of June, anno Domini eighteen hundred and thirty-nine.

HENRY W. FULLER.

19 No. 15, 802.

STATE OF ILLINOIS, *McDonough County, ss:*

I, William H. Randolph, clerk of the circuit court, and ex officio recorder within and for said county, do hereby certify that the within instrument of writing was filed for record in my office on the 29th day of June, 1855, at 2 o'clock p. m., and duly recorded in volume E of Mortgages, on pages 650, 651, and 652.

In testimony whereof, I have hereunto set my hand and the seal of said court, at Macomb, the day and year above written.

[L. S.] WM. H. RANDOLPH, *Clerk.*

In the Brown circuit court, county recorder's office, 4817.

STATE OF ILLINOIS, *Brown County, sct:*

I, Archibald A. Glenn, clerk of the circuit court, and ex officio recorder within and for said county of Brown, do hereby certify that the annexed deed of conveyance and certificate of acknowledgment have been duly recorded in my office in Book O, at pages 605 and 606.

In testimony whereof, I have hereunto set my hand and affixed my seal of office, at Mount Sterling, this 1st day of April, in the year of our [L. S.] Lord one thousand eight hundred and fifty-eight.

A. A. GLENN, *Clerk.*

20 STATE OF ILLINOIS, *Brown County, ss:*

I, Benjamin D. Stout, clerk of the county court of Brown County aforesaid, do hereby certify that the foregoing is a full, true, and correct copy of the last will and testament of Robert C. Vose, deceased, and of the certificates thereto attached, and of the probate and record thereof in this court. Rec'd Book A, p. 300 and 301. Fee $2 75.

Witness my hand, and the seal of said court, this fifth day of Jan- [L. S.] uary, A. D. 1859.

BENJAMIN D. STOUT, *Clerk.*

STATE OF MAINE, *County of Kennebec, ss:*

I, Joseph Burton, register of the court of probate in and for the county aforesaid, do hereby certify that the foregoing is a full, true, and perfect copy of the last will and testament of Robert C. Vose, deceased, and of the proof and authentication thereof, as appears of record in my office, and that said last will and testament, of which of the foregoing is a true copy, was duly executed and proved agreeably to the laws and usages of the said State of Maine.

Witness my hand and the seal of said court, this 8th day of De- [L. S.] cember, A. D. 1858.

J. BURTON, *Register as aforesaid.*

21 Fourth. A deed from Renel Williams and George W. Morton to James G. Barrows, with the accompanying certificates, in words and figures following, to wit:

Know all men by these presents that we, Renel Williams and Geo. W. Morton, of Augusta, in the county of Kennebec, and State of Maine, executors of the last will and testament of the late Robert C. Vose, in consideration of eleven hundred dollars paid by James G. Barrows, of the State of Illinois, the receipt whereof we do hereby acknowledge, do hereby remise, release, bargain, sell, and convey, and forever quitclaim unto the said Barrows, his heirs and assigns forever, all the right, title, and interest which the said Vose had at the time of his death in and to the following described land,

viz: The southeast quarter of section two, in township one south, of range four west of the fourth principal meridian, in the county of Brown, and State of Illinois, being the military land patent granted to one Eleazor Whitney, a soldier of the United States in the late war with Great Britain. To have and to hold the same, together with all the privileges and appurtenances thereunto belonging, to him, the said Barrows, his heirs and assigns forever. And we do covenant with the said Barrows, his heirs and assigns, that we will warrant and forever defend the premises to him, the said Barrows, his heirs and assigns, forever against the lawful claims and de-
22 mands of all persons claiming by, through, or under us as executors aforesaid, excepting all incumbrance made by non-payment of taxes, disseisin, and any conveyance made by Sanford A. Kingsbury, as our attorney.

In witness whereof, we, the said Renel Williams and Geo. W. Morton, as executors aforesaid, have hereunto set our hands and seals, this eighteenth day of March, in the year of our Lord one thousand eight hundred and sixty-one.

RENEL WILLIAMS. [SEAL.]
GEO. W. MORTON. [SEAL.]

Signed, sealed, and delivered in presence of—
J. L. CUTLER.

KENNEBEC, *ss:*

MARCH 18, 1861.

Personally appeared the above-named Renel Williams and Geo. W. Morton, and acknowledged the above instrument to be their free act and deed, before me.

JOSEPH H. WILLIAMS, *Justice of the Peace.*

STATE OF MAINE, *Kennebec County, ss:*

I, William M. Stratton, clerk of the supreme judicial court of Maine for the said county of Kennebec, the same being a court of record, do hereby certify that Joseph H. Williams, esq., before whom the within written acknowledgment was made, was at the date thereof a justice of the peace for the said
23 county, duly authorized to take acknowledgments of deeds, &c., and that the signature thereto purporting to be his is genuine.

I further certify that the within deed is made, executed, and acknowledged in conformity to the laws of this State, as they existed at the date thereof, and now exist.

In testimony whereof, I hereunto subscribe my name and affix the seal of
[L. S.] said court, this twentieth day of March, anno Domini eighteen hundred and sixty-one.

WM. M. STRATTON.

Recorder's office.

STATE OF ILLINOIS, *Brown County, ss:*

I, A. A. Glenn, clerk of the circuit court, and ex officio recorder of said county, certify that the annexed instrument of writing and certificates thereto have been duly recorded in my office, in Book Q, at page 750.

[L. S.] Given under my hand and official seal this 14th day of May, A. D. 1861.

A. A. GLENN, *Clerk and ex officio recorder.*

Filed May 14th, 1861, Book Q, p. 750.

A. A. GLENN, *Clk.*

24 It was admitted that at the time of the commencement of this suit said defendant was in possession of the land in controversy.

Plaintiff here rested his case.

Defendant, to maintain the issue on his part, offered the following evidence:

First. A record of the circuit court of the United States for the southern district of Illinois, in the case of James G. Barrows *vs.* James R. Gordan, in ejectment, in words and figures following, to wit:

JAMES G. BARROWS
v. } In ejectment.
JAMES R. GORDON.

Be it remembered, that heretofore, to wit, on the twenty-fourth day of June, at the June term of the circuit court of the United States for the southern district of Illinois, in the year of our Lord one thousand eight hundred and fifty-eight, came the said plaintiff by his said attorneys, and filed in open court his declaration in ejectment, together with a notice to said defendant, and an affidavit of a due service of a true copy thereof upon said defendant, and also at the same time filed his bond for costs in said entitled cause, which said bond for costs, declaration, notice, and affidavit are in the words and figures following, to wit:

25 United States circuit court, June term, A. D. 1858.

JAMES G. BARROWS
v. } In ejectment.
JAMES R. GORDON.

UNITED STATES OF AMERICA, *Southern district of Illinois, ss:*

I enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court, and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by plaintiff, I hereby agree and stipulate that execution may issue against my property for any costs taxed against plaintiff.

Dated this 12th day of June, A. D. 1858.

B. W. BARROWS.

United States circuit court, June term, A. D. 1858.

UNITED STATES OF AMERICA, *Southern district of Illinois, ss:*

James R. Gordon, who is a citizen of the State of Illinois, was summoned to answer unto James G. Barrows, who is a citizen of the State of New Jersey, of a plea of trespass and ejectment, for that, whereas, heretofore, to wit, on the 7th day of June, in the year of our Lord one thousand eight
26 hundred and fifty-eight, at and within the county of Brown, southern district and State of Illinois, the said plaintiff was possessed as of his own demesne in fee simple of a certain tract of land situate at and within the said county, district, and State, and known as the southeast quarter of section two, in township one south, range four west of the fourth principal meridian, which land exceeds in value five hundred dollars; and the said plaintiff being then and there so possessed of said premises, he, the said defendant, thereafterwards, to wit, on the day and year aforesaid, entered into the said described premises, and from the time last aforesaid has unlawfully withheld and does now unlawfully withhold from the said plaintiff the possession of the said premises, to the damage of the said plaintiff the sum of one hundred dollars, and therefore he brings suit, &c.

WILLIAMS, GRIMSHAW & WILLIAMS,
Attorneys for Plaintiff.

To Mr. James R. Gordon:

You are hereby notified that the declaration, with a copy of which you are now herewith served and to which this notice is subjoined, will be filed in the circuit court of the United States for the southern district of Illinois on the twelfth day of the June term thereof, A. D. 1858, and that upon
27 filing the same a rule will be entered requiring you to appear and plead to the said declaration within twenty days after the entry of said rule, and that if you neglect so to appear and plead, a judgment by default will be entered against you, and the plaintiff will recover possession of the premises specified in the said declaration.

Dated this 7th day of June, 1858.

WILLIAMS, GRIMSHAW & WILLIAMS,
Attorneys for Plaintiff.

United States circuit court, June term, A. D. 1858.

JAMES G. BARROWS
v.
JAMES R. GORDON. } In ejectment.

STATE OF ILLINOIS, *Brown County*, ss:

Arthur H. Barrows, being duly sworn, deposes and says that he did, on the twelfth day of June, A. D. 1858, serve James R. Gordon, the defendant in this suit, with a true copy of the declaration hereunto annexed, and also a true copy of the notice in writing to the said declaration subjoined and likewise hereunto annexed, by leaving the same at his place of residence with Alexander Wilson, a free white person over the age of ten years, and a member of the family in which said Gordon resides. And further this deponent saith not.

ARTHUR H. BARROWS.

28 Subscribed and sworn to before me this 12th day of June, A. D. 1858, the seal of said court being hereunto affixed.

[L. S.] A. A. GLENN,
Clerk of cir. court of Brown County, Illinois.

Endorsed: Filed this 24th day of June, A. D. 1858.
GEO. W. LOWRY, *Clerk.*

And on the same day the following proceedings were had in said court in said entitled cause and entered of record, to wit:

JAMES G. BARROWS
v.
JAMES R. GORDON. } In ejectment.

This day came the plaintiff, by his attorneys, and filed his declaration in ejectment herein, together with a notice in writing thereto attached, and upon reading and filing an affidavit of the due service of a true copy of the declaration and notice upon the said defendant, it is ordered, on motion of plaintiff by his attorney, that the defendant plead thereto in twenty days or that his default be entered.

29 It is further ordered, on motion of plaintiff by his attorneys, that this cause be continued until the next term of this court.

And on the same day came the defendant, by his attorneys, and filed in the office of the clerk of said court his pleas in said entitled case, which said plea is in the words and figures following, to wit:

Circuit court of the United States, southern district of Illinois.

JAMES R. GORDON *ats.* JAMES G. BARROWS.

Said defendant says actio non, because he says that he is not guilty of the said trespasses in ejectment in manner and form as plaintiff hath hereof above complained against him; and this he prays may be enquired of by the country.

BROWNING & BUSHNELL, *P. D.*

Pl'ff the like.

WILLIAMS, GRIMSHAW & WILLIAMS, *P. Q.*

Endorsed: Filed June 24, 1858.

GEO. W. LOWRY, *Clk.*

30 And afterwards, on the second day of February, in the year of our Lord one thousand eight hundred and fifty-nine, the following further proceedings were had in said court in said entitled cause and entered of record, to wit:

JAMES G. BARROWS *v.* JAMES R. GORDON. } In ejectment.

This day came the parties by their attorneys, and issue being joined by agreement, a jury is waived, and the cause is submitted to the court for trial; and the court having heard the evidence, it is ordered that the further trial be continued to a future day of this court.

And afterwards, on the fifth day of February, in the year last aforesaid, the following further proceedings were had in said court in said entitled cause and entered of record, to wit:

JAMES G. BARROWS *v.* JAMES R. GORDON. } In ejectment.

This day came again the parties by their attorneys, and the court
31 having heard the arguments of counsel, and not being sufficiently advised in the premises, takes time to consider.

And afterwards, on the sixth day of June, in the year last aforesaid, the following further proceedings were had in said court in said entitled cause and entered of record, to wit:

JAMES G. BARROWS *v.* JAMES R. GORDON. } Ejectment.

This day came again the parties by their attorneys, and the court being now sufficiently advised of and concerning the issue joined herein, doth find the issue for the defendant, and that the defendant is not guilty of withholding from the possession of the said plaintiff the premises in his declaration described.

It is therefore considered and adjudged by the court that the said defendant recover of and from the said plaintiff his costs and charges herein about his suit in this behalf expended, amounting to the sum of dollars and cents, and that they have an execution therefor, &c.

32 To the introduction of which said record in evidence said plaintiff objected for want of competency and relevancy to the issue in the case. The court overruled said objection and permitted said record to be read in evidence, to which opinion and decision of the court in permitting said record to be read in evidence plaintiff, by his counsel, at the time said opinion and decision was made and announced, then and there excepted.

Second. The defendant then proved that the present defendant, Kindred, was the tenant of James R. Gordon aforesaid by written lease for the premises in controversy, dated November eleventh, A. D. 1860, to commence March first, A. D. 1861, and to terminate three years after said latter date. The plaintiff objected to the said evidence of tenancy for want of competency and for want of relevancy to the issue. The court overruled said objections and permitted said proof to be given to the jury; to which opinion and decision of the court in permitting said evidence of tenancy to be given to the jury plaintiff then and there excepted at the time said opinion was made and announced.

Said defendant further proved that on the trial of said ejectment
33 suit of Barrows *vs.* Gordon, hereinbefore set forth, that said plaintiff, Barrows, offered and read in evidence the aforesaid patent to Whitney, the aforesaid deed from said Whitney to Vose, and the aforesaid will of Vose hereinbefore inserted, with the aforesaid certificates; that said plaintiff on said trial also offered to read in evidence. A power of attorney, with certificates accompanying the same, from said executors of Vose to Sanford A. Kingsberry, in words and figures following, to wit:

Know all men by these presents that we, Renel Williams and Geo. W. Morton, of Augusta, in the State of Maine, executors of the last will and testament of the late Robert C. Vose, by authority vested in us by said will, do hereby constitute and appoint Sanford A. Kingsberry, of Galesburg, in the State of Illinois, our true and lawful attorney for us and in our capacity as executors aforesaid, to sell and convey all the right, title, and interest the said Vose died seized of in the following described parcel of land, situate in the State of Illinois, viz: Southeast quarter of section two, township one south, range four west, patentee Eleazer Whitney; also northwest
34 quarter of section eight, township ten north, range six east, patentee Henry Marston; also southwest quarter of section five, township six north, range seven west, patentee John Hancock; and also southwest quarter of section twenty-six, township five north, range six west, patentee James Harrington; not intending to warrant against any title arising from non-payment of taxes or possession at any time, but intending hereby to authorize the said Sanford A. Kinsberry to convey all claim we may have as executors aforesaid to said described land at the time the said Kinsberry shall convey the same; hereby ratifying and allowing all and whatsoever our said attorney shall lawfully do in and about the premises aforesaid by virtue hereof. In testimony whereof we have hereunto set our hands and seals the eighteenth day of December, in the year of our Lord one thousand eight hundred and fifty-seven.

RENEL WILLIAMS. [SEAL.]
GEO. W. MORTON. [SEAL.]

Sealed and delivered in presence of—
CHAS. K. NICHOLS.
ASAPH R. NICHOLS.

STATE OF MAINE, *County of Kennebec, ss:*

35 On this eighteenth day of December, in the year of our Lord one thousand eight hundred and fifty-seven, before me, Asaph R. Nichols, esquire, a notary public duly appointed, commissioned, and sworn, resid-

ing in the city of Augusta, personally appeared Renel Williams and George W. Morton, esq'rs, and in their capacities of executors of the last will and testament of the late Robert C. Vose, esq'r, late of Augusta, deceased, and severally acknowledged the annexed power of attorney, by them subscribed in my presence to be their free act and deed.

[SEAL.] In testimony whereof, I have hereunto set my hand and affixed my notarial seal the day and year above written.

ASAPH R. NICHOLS, *Notary Public.*

In the Brown circuit court, recorder's office, 4819.

STATE OF ILLINOIS, *Brown County, sct:*

I, Archibald A. Glenn, clerk of the circuit court and ex officio recorder within and for said county of Brown, do hereby certify that the annexed deed of conveyance and certificate of acknowledgment have been duly recorded in my office in Book O, at pages 607, 608.

[SEAL.] In testimony whereof, I have hereunto set my hand and affixed my seal of office, at Mt. Sterling, this 1st day of April, in the year of our Lord one thousand eight hundred and fifty-eight.

A. A. GLENN, *Clerk.*

Filed April 1, 1858.

A. A. GLENN, *Clerk.*

36 Also a deed in words and figures following, to wit:

This indenture, made this twenty-fifth day of March, in the year of our Lord one thousand eight hundred and fifty-eight, between Renel Williams and George W. Morton, executors of the last will and testament of R. C. Vose, late of Augusta, State of Maine, by their attorney in fact, S. A. Kingsberry, of the first part, and Joseph C. Scroggs, of Knox Co., State of Illinois, of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of one dollar, lawful money of the United States of America, to me in hand paid by the party of the second part, the receipt of which is hereby acknowledged, have remised, released, conveyed, and quitclaimed, and by these presents do remise, release, convey, and quitclaim, unto the said party of the second part, and to his heirs and assigns forever, all their certain tract or parcel of land situate, lying, and being in the county of Brown and State of Illinois, as executors as aforesaid, known and described as follows, viz: The southeast quarter of section No. two, (2,) in township No. one (1) south, and in range four (4) west of the fourth principal meredian, in said county, together with all and singular the hereditaments and appurtenances thereto belonging or
37 in anywise appertaining. To have and to hold the said premises as above described unto the said party of the second part, his heirs and assigns forever.

In testimony whereof, the said Williams and Morton, by their said attorney in fact, have hereunto set their hands and seals the day and year first above written.

RENEL WILLIAMS, [SEAL.]
Executor of estate of R. C. Vose,
By his attorney in fact, S. A. KINGSBERRY.
GEORGE W. MORTON, [SEAL.]
Executor of estate of Robert C. Vose,
By his attorney in fact, S. A. KINGSBERRY.

Signed, sealed, and delivered in presence of.

STATE OF ILLINOIS, *County of Knox, ss:*

I, T. A. Boyd, a notary public of said county, do certify that on this day personally appeared before me, S. A. Kingsberry, as attorney in fact of R. Williams and G. W. Morton, executors of will of R. C. Vose, whose name appears signed to the foregoing deed of conveyance, and who is personally known to me to be the identical person whose name is subscribed to said deed as having executed the same, and acknowledged that he had executed the same as his voluntary act and deed, for the uses and purposes
38 therein expressed.

Given under my hand and notarial seal the 27th day of March, eighteen hundred and fifty-eight.

[L. S.] G. A. BOYD, *Notary Public.*

STATE OF ILLINOIS, *Brown County, ss:*

I, A. A. Glenn, clerk of the circuit court and ex officio recorder within and for said county, do certify that the foregoing is a full, perfect, and complete copy of a deed recorded in my office in Book O, pages 607 and 608 of the records of said county, and the certificate of acknowledgment thereto, and that the same was duly recorded on the 1st day of April, A. D. 1858, as appears from the records of my said office.

[L. S.] In testimony whereof, I have hereunto set my hand and the seal of said circuit court this 11th day of January, A. D. 1859.

A. A. GLENN, *Clerk,*
By B. D. STOUT, *Deputy.*

39 Also a deed from said Scroggs, dated 29th March, 1858, from Joseph C. Scroggs to James G. Barrows for the land in controversy, with a consideration therein expressed of eleven hundred dollars, and also proved that the deed heretofore herein inserted, from the executors of Vose to James G. Barrows, was founded on the original consideration which passed from Barrows for the deed made and herein copied from Scroggs to said Barrows; and also proved that the court, on said trial referred to, permit the plaintiff therein to read in evidence the said power of attorney from the executors of said Vose to said Kingsberry and the deed of said executors to said Scroggs, for the reason assigned by the court that executors could not make an attorney to sell or convey lands by an attorney; and the defendant also further proved that the foregoing evidence stated as given and offered by the plaintiff in the said trial of Barrows *v.* Gordon was all the evidence given or offered on said trial; to all of which evidence when offered plaintiff objected. This was all the evidence offered or given in the case. And thereupon plaintiff moved the court to charge the jury, first, that the aforesaid record and the testimony accompanying it did not constitute a bar in this case to tne right of plaintiff to recover in this action; second, that the plaintiff had shown title in *in* fee to the premises in controversy and
40 was entitled, under the issue and proof herein, to recover in fee simple against defendants.

Which charge the court refused to give; to which opinion and decision of the court in refusing to charge the jury as asked by plaintiff, the said plaintiff by his counsel then and there at the time of such refusal excepted. The court thereupon charged the jury that the judgment in the ejectment suit of James G. Barrows *vs.* James R. Gordon, the record of which has been given in evidence by the defendant on this trial, taken in connection with the other evidence given in the present trial, constituted a bar to a recovery by the

plaintiff in the present action, and that upon the evidence submitted to them in this case it will be their duty to find the defendant not guilty.

To which opinion and decision of the court, in charging the jury as aforesaid, plaintiff at the time said charge was given and announced then and there excepted.

The jury under the said charge of the court found a verdict for defendant on the issue joined, and the court entered final judgment upon said
41 verdict.

To preserve all which matters and things of record in this cause, plaintiff moves the court that this his bill of exceptions, taken during the trial of this cause, be signed and sealed by the court and made a part of the record herein during the progress of said trial, which is done accordingly.

S. H. TREAT. [SEAL.]

Endorsed: Filed June 18th, 1863.

P. P. ENOS, *Clerk.*

And thereupon the plaintiff lodged in the clerk's office of this court a writ of error, in the words and figures following, to wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the eighth circuit and southern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the circuit court before you or some of you,
42 between James G. Barrows, plaintiff, and Granville L. Kindred, defendant, a manifest error hath happened to the great damage of the said James G. Barrows, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, and under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Roger B. Taney, chief justice of the Supreme Court of the United States of America, at Washington, this sixteenth day of January, in the year of our Lord one thousand eight hundred and sixty-four, and of our independence the eighty-eighth.

P. P. ENOS, *Clerk.*

43 Which said writ is endorsed as follows: James G. Barrows *vs.* Granville S. Kindred. Copy of a writ of error lodged in pursuance of the statute of the United States, in such case made and provided, for the above-named James G. Barrows, plaintiff in error. Springfield, 16th January, 1864. Jackson Grimshaw, att'y for pl'ff in error.

And on the same day came the said plaintiff by his attorneys, and filed in the office of the clerk of said court his bond, in words and figures following, to wit:

Supreme Court of the United States.

JAMES G. BARROWS
vs.
GRANVILLE L. KINDRED.

Error to the circuit court of the United States for the southern
44 district of Illinois.

Know all men by these presents that we, Jackson Grimshaw and John H. Williams, are held and firmly bound unto the above-named Granville L. Kindred in the sum of five hundred dollars, to be paid to the said Granville L. Kindred, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us jointly, severally, and firmly, and our and each of our heirs, executors, and administrators, by these presents. Sealed with our seals, and dated this 16th day of January, A. D. 1864.

Whereas the above-named James G. Barrows hath prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled cause by the circuit court of the United States for the southern district of Illinois, at the June term thereof, A. D. 1863:

Now, therefore, the condition of this obligation is such that if the aforenamed James G. Barrows shall prosecute his said writ of error to
45 effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise, the same shall remain in full force and virtue.

(Signed) JACKSON GRIMSHAW. [SEAL.]
JOHN H. WILLIAMS. [SEAL.]

Approved Jan'y 16th, 1864.

S. H. TREAT,
U. S. Dist. Judge, Southern Dist. of Illinois.

Endorsed: Filed Jan'y 16, 1864.

P. P. ENOS, *Cl'k.*

Whereupon a writ of citation was issued, which said writ, together with the acknowledgment of service therein, is in the words and figures following, to wit:

UNITED STATES OF AMERICA, *ss:*

To Granville L. Kindred:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday in December next, pursuant to a writ of error filed in the clerk's office
46 of the circuit court of the United States for the eighth circuit and southern district of Illinois, wherein James G. Barrows is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness Samuel H. Treat, district judge of the United States for the southern district of Illinois, and one of the judges of the circuit court of the United States for the said district, this sixteenth day of January, in the year of our Lord one thousand eight hundred and sixty-four, and of our independence the eighty-eighth year.

S. H. TREAT, *Dist. Judge.*

Which writ is endorsed as follows, to wit: On this the thirtieth day of January, A. D. 1864, this citation was duly served on us, by delivering to us a true copy thereof, which service is acknowledged on that day.

BROWNING & BUSHNELL,
Attorneys for Defendants.

47 UNITED STATES OF AMERICA,
Southern district of Illinois, ss:

I, Pascal P. Enos, clerk of the circuit court of the United States for the southern district of Illinois, do hereby certify the foregoing to be a full, true, and complete transcript of the record and proceedings had in a certain cause, wherein James G. Barrows is plaintiff and Granville L. Kindred is defendant, as the same appears on file and of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Springfield, in said district, this first day [SEAL.] of February, in the year of our Lord one thousand eight hundred and sixty-four, and of our independence the eighty-eighth.

P. P. ENOS, *Clerk.*

Fees for transcript $11 40, received of plaintiff in error.

P. P. ENOS, *Clk.*

48 *Assignment of errors.*

And now the aforesaid James G. Barrows, by Jackson Grimshaw, his attorney, comes and says that in the foregoing record and proceedings there is manifest error in this, to wit:

First. The court erred in admitting in evidence the record in the case of James G. Barrows *vs.* James R. Gordon, against plaintiff's objections.

Second. The court erred in admitting evidence that the present defendant was the tenant of James R. Gordon, the defendant in said suit.

Third. The court erred in admitting all the evidence offered for defendant and each portion thereof.

49 Fourth. The court erred in refusing to charge the jury, as asked by plaintiff, that James G. Barrows was entitled to recover the premises sued for in fee simple.

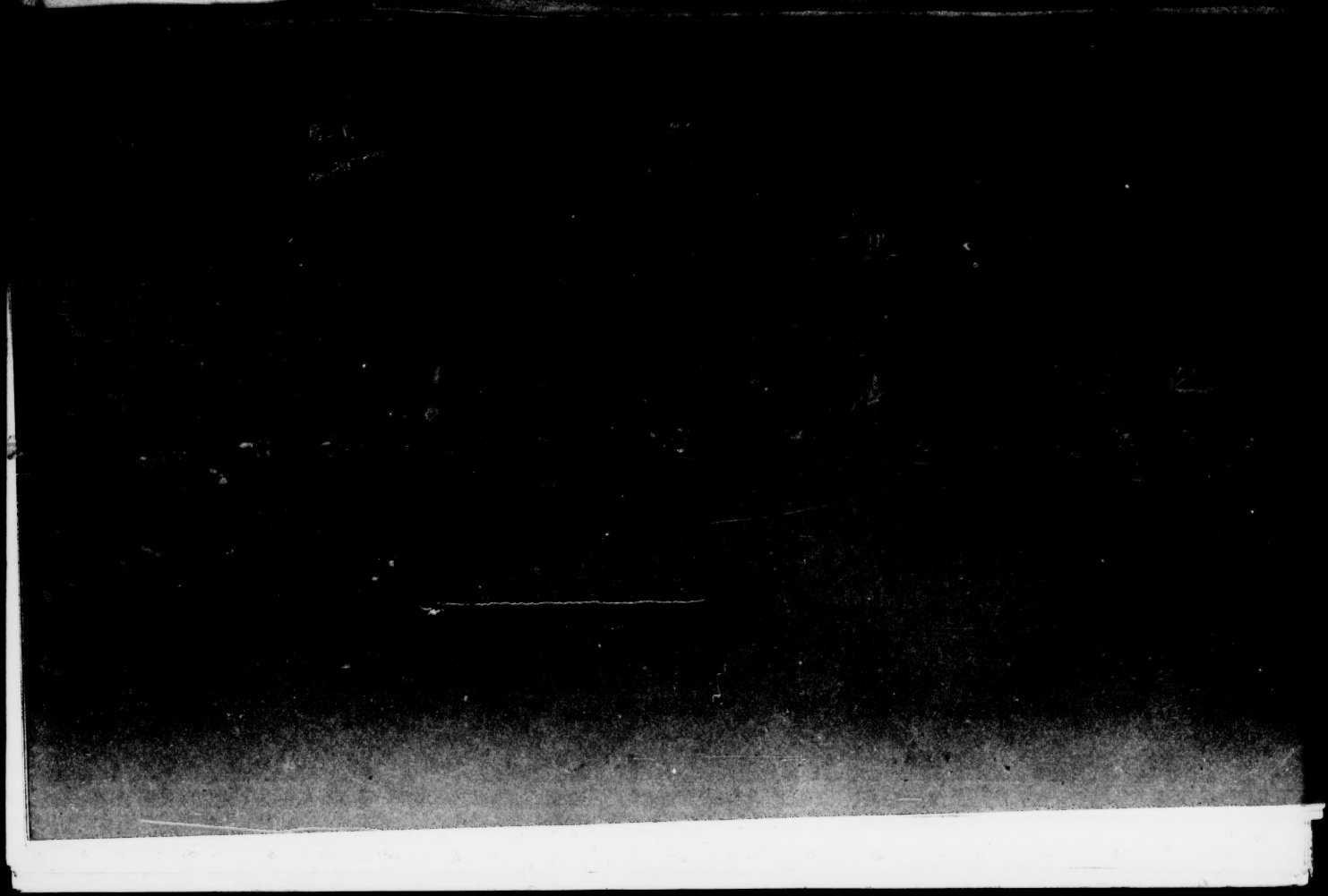
Fifth. The court erred in charging the jury that the judgment in the case of Barrows *vs.* Gordon, above embodied in this record, together with the other evidence in the case, was a bar to the plaintiff's right to recover in this suit.

Sixth. The court erred in charging the jury that they should find for the defendant, when by law the court should have charged the jury to find a verdict for the plaintiff, James G. Barrows.

Wherefor, and for divers other errors apparent on the face of said record, said plaintiff in error, James G. Barrows, prays that the aforesaid proceedings be reversed, and said cause be remanded to said circuit court.

JACKSON GRIMSHAW,
Att'y for Pl'ff in error.

Filed March 14, 1864.



SUPREME COURT OF THE UNITED STATES.

No. .

JAMES G. BARROWS, *Plaintiff in Error,*

vs.

GRANVILLE L. KINDRED, *Defendant in Error.*

EJECTMENT.

ERROR TO THE CIRCUIT COURT OF UNITED STATES FOR NORTHERN DISTRICT OF ILLINOIS.

ARGUMENT FOR PLAINTIFF IN ERROR.

Revised — Jany 12 —
Swayne

JAMES G. BARROWS, Plaintiff in Error, *vs.* GRANVILLE L. KINDRED, Defendant in Error.	*Supreme Court of the United States.* *No.* *Ejectment.*

Error to the Circuit Court of the United States for the Northern District of Illsnois.

ARGUMENT FOR PLAINTIFF IN ERROR.

It will appear by the record in this case that this action of ejectment was commenced on the 21st day of May, 1861, by the present plaintiff in error against defendant in error, for the recovery of the S. E. quarter of section 2, township one south, range 4 west, of fourth principal meridian, in Brown county, Illinois. That plaintiff in error claimed title to said premises in fee, and alleged that on the 1st day of May, 1861, defendant entered upon said premises, and from that time unlawfully has withheld from plaintiff the possession of said premises. Defendant's plea was not guilty, and a joinder was had thereon.

This put in issue the title of plaintiff to the land in controversy, as such title existed in plaintiffs in error on the 21st May, 1861, and also the possession of defendant at that date.

There was no controversy about the fact that defendant had possession at that date, and on page 10 of printed record, it will appear that the possession was admitted. The only remaining question was, had plaintiff title in fee simple to the premises in controversy on 21st May, 1861?

Plaintiff, without objection, deduced title in fee to the premises from the United States to Robert C. Vose, and, without objection, proved that Vose, by will, duly probated in the State of Maine, on last Monday of July, 1836, authorized Reuel Williams and George W. Morton, and the survivors of them, to sell, and by proper deeds to convey in fee, all the real estate whereof he might die seized, except "his mansion house on Court street, &c."

Plaintiff also proved by deed, in due form, without objection, a conveyance in fee simple for the land in controversy, from Reuel Williams (misprinted in record Renel Williams), and Geo. W. Morton to plaintiff, and rested his case.

Thus far plaintiff below, now the plaintiff in error, was clearly entitled to a verdict. Defendant, against the objections of plaintiff, as shown in the record, and with exceptions to all rulings of the court taken at the time, was then permitted by the Court to prove by the records of the said Circuit Court of the Southern District of Illinois, that on the 7th day of June, 1858, plaintiff commenced an action of ejectment for this same land against one James R. Gordon, who for the sake of argument is admitted to have been the landlord of the present defendant, which resulted in a judgment in said Court on the 6th day of June, 1859; that the issue was found for defendant, and that the defendant is not guilty of unlawfully withholding from the possession of the plaintiff the premises in controversy. (Record, p. 12.)

The bill of exceptions shows the title litigated in that cause as follows:

The same title to the premises in controversy from the United States to Robert C. Vose.

Then a power of attorney from said Reuel Williams and George W. Morton to Sanford A. Kingsbury, empowering him to convey this land for them, Williams and Morton, in their capacity as executors, said power dated 18th December, 1857. (Record p. 13).

Then a deed by said Williams and Morton, as executors of Vose, by Kingsbury, their attorney in fact, to Joseph C. Scroggs (record p. 14), dated 25th May, 1858, for these premises; and then a deed for this same land, dated 29th March, 1858, from said Scroggs to James G. Barrows, plaintiff; and said Kindred, against objection of plaintiff, proved that the consideration for the conveyance through the power of attorney, was the same that passed for the deed to Barrows from the executors, read in this case.

This was all the evidence.

The plaintiff, in effect, asked the Court to charge the jury that plaintiff had shown title in fee to said premises, and was entitled to recover the premises in fee simple, and that said record in the suit against Gordon constituted no bar to his recovery in the suit against Kindred.

The Court refused the instructions, and an exception was taken.

The Court did charge the jury that said record in the case of Barrows *vs.* Gordon, with the other evidence, constituted a bar to the present action; which charge was excepted to.

The jury, under said charge, on the 18th June, 1863, found a verdict that said defendant was not guilty of unlawfully withholding from the plaintiff the possession of the real estate in plaintiff's declaration, judgment was rendered on said verdict.

Now, the Court will see from the record that the present suit was commenced on the 21st of May, 1861 (record p. 2); that the title offered in evidence in the present suit by plaintiff, for the purpose of recovery, was acquired by deed directly from the executors of Vose on the 18th of March, 1861. (Record p. 9).

That the suit set up in bar of this action was commenced on the 12th of June, 1858 (record p. 11), and terminated on the 6th June, 1859, (record p. 12), the title therein offered being deduced through a void power of attorney (record, p. 13). And that on the trial of that cause, which is now set up as a bar to a recovery in the present suit, the Court refused to permit the present plaintiff to read therein in evidence said power of attorney, and the deed made thereunder, for the reason that executors could not by power authorize an attorney to sell or convey lands, (Record, p. 15).

In the first action plaintiff was beaten, because after deducing title in fee from the Government to Vose, he failed to trace title from Vose to himself; because Vose's executors, who had power to sell, had delegated it without authority of law to an attorney, who had conveyed to plaintiff. And in the second action plaintiff was again beaten after he had acquired title directly from the executors, subsequent to the judgment in first suit, because he had been beaten in the first suit for want of title, when he commenced the first action.

The present plaintiff was properly defeated in the first suit, because although he traced title from the Government to Vose, he failed to trace title to himself.

In the second suit, by title acquired from Vose, through his executors, who had power to convey, he showed title in himself, acquired after the former judgment, and regularly derived from the Government through Vose to himself.

He should not be defeated in the first suit, because when he brought

that suit he had *no title*, and then defeated in this suit because after the first suit had terminated, he acquired a paramount legal title.

Formerly the practice in an action of ejectment was the fictitious suit by lease, entry and ouster. The Supreme Court of the State of Illinois in Coleman *vs.* Henderson, 2 Scammon, 252, decided in June, 1840, that "The effect of a recovery in ejectment is correctly stated by Lord Mansfield in 1 Burrough, 114, a recovery of possession (not of the seizin or freehold), without prejudice to the right as it may afterward appear it was between the parties."

The present ejectment law of Illinois went into force 1st June, 1839, and is almost a literal copy of the New York law in force at the time; and like the New York law, provides:

"Every judgment in the action of ejectment, rendered upon a verdict, shall be conclusive as to the title *established* in such action, upon the party against whom the same is rendered, and against all persons claiming from, through or under such party by title accruing after the commencement of such action, subject to exceptions hereinafter named."—Act 1st June, 1839, sec. 29.

A verdict for a plaintiff, of necessity, establishes a title in the plaintiff at thetime of commencement of the suit; while a verdict for the defendant is simply not guilty, and does not establish a title in any one.

The plaintiff does not recover because he shows no title, or perhaps because defendant was not in possession of the premises. And certainly defeat of a plaintiff for want of title, does not preclude him from bringing another action after he, subsequent to first suit, gets a title.

Such a construction of the law of ejectment would operate effectually to prevent a plaintiff in ejectment, once unsuccessful in his suit, from ever acquiring title to premises.

The trial, as far as the plaintiff is concerned, relates to the state of title as it existed in plaintiff when he brought his suit. If he fails in his suit defendant goes "without day," but no title is *established* by plaintiff's defeat.

I refer to Smith *vs.* Sherwood, 4 Connecticut, 279,

And especially to Chief Justice Hosmer's opinion as to the effect of a former judgment, not upon the same point or title. The Court, it is true, divided upon some of the points, but in the main the

case decides the question raised by this record. The title set up in this suit has never been litigated between these parties, for the reason that plaintiff had it not when former suit was disposed of.

Plaintiff had not even an equity in the land when suit against Gordon was brought; and if he had, in the United States Court, he could not recover on an equity.

Fenn *vs.* Hulme, 21 Howard, 486, 487.
24 Howard, 426.

"In an action of ejectment, title in the lessor of plaintiff, and possession in the defendant *at the commencement* of the suit, are the two things which must be established to justify a recovery."

Eastin *vs.* Rucker, 1 J. J. Marshal, 234.

So in trespass to try title.

Binda *vs.* Benbow, 11 Richardson (S. C.), 24.

Bank of So. Ca. *vs.* Bridges, 11 Richardson Law (S. C.), 87.

University *vs.* Maultsby, 2 Jones Eq. (N. C.), 241.

Gilbert *vs.* Thompson, 9 Cushing, 348.

Shuster *vs.* Perkins, 2 Jones' Law (N. C.) 217.

The proposition that I contend for is so well settled by principle and authority, and our statute above quoted so plain, that I most respectfully ask that the judgment of the Circuit Court in this case be reversed, and caase remanded for trial.

JACKSON GRIMSHAW,
Attorney for Plaintiff in Error.